No. 15 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1951

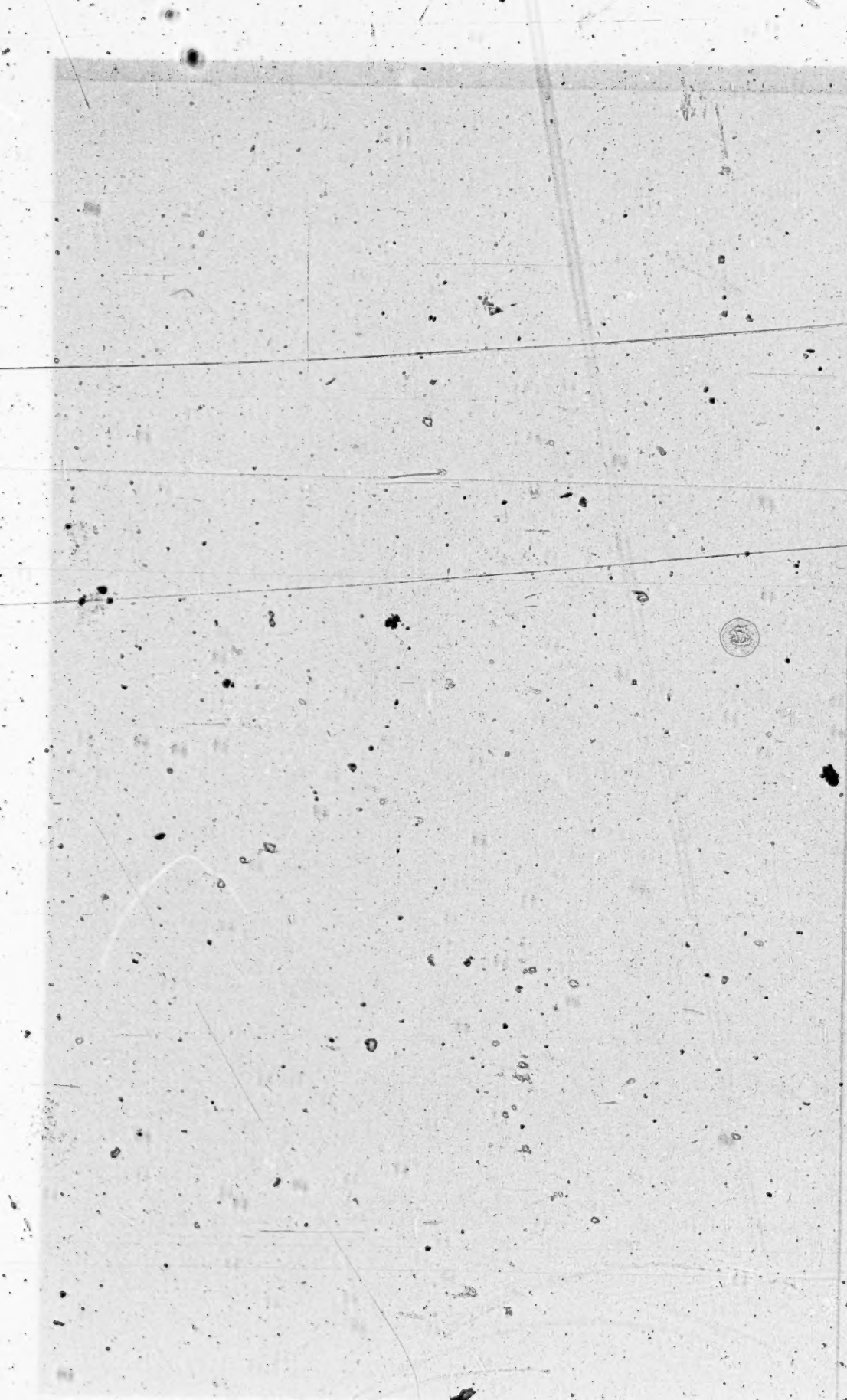
FAR EAST CONFERENCE, UNITED STATES LINES COMPANY, STATES MARINE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES



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OPINION BELOW

The opinion of the district court (R. 97) is reported at 94 F. Supp. 900.

JURISDICTION

The order of the district court denying the motions to dismiss the complaint was entered on March 7, 1951 (R. 104-5). The motion for leave to file a petition for writ of certiorari was filed on June 2,

1951, and the motion and petition were granted on October 8, 1951 (R. 105). Jurisdiction of this Court is conferred by 28 U.S.C. 1651 (a).

QUESTION PRESENTED

A conference of shipping lines and its members have been charged in a civil action by the United States under the Sherman Act with engaging in a combination and conspiracy to coerce shippers to patronize conference members exclusively by exacting from shippers who do not enter exclusive dealing contracts with conference members a discriminatively higher rate than is charged those who enter such contracts. Motions to dismiss the action on the ground that the subject matter of the suit is exclusively within the jurisdiction of the Maritime Board were denied.

The question presented is whether the Shipping Act, 1916, as amended, deprives the district court of jurisdiction of this action.

STATUTES INVOLVED

The pertinent sections of the Sherman Act, the Clayton Act and the Shipping Act, 1916, as amended, are set forth in the Appendix, *infra*, pp. 44-47.

STATEMENT

Petitioners seek reversal of an order of the district court denying motions to dismiss a civil complaint against them by the United States charging violations of Sections 1 and 2 of the Sherman Act.

The principal charge of the complaint (par. 32, R. 5-6) is that petitioners have engaged in:

> a continuing agreement and concert of action * * * to control the transportation of all cargo in the outbound Far East trade by establishing and maintaining a system of "contract rates" and higher "non-contract rates," the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade.

Cancellation of the exclusive dealing contracts, and injunctive relief to prevent resumption of the activities alleged to be unlawful, are sought by the complaint (R. 7-8).

The facts

This case arises on the complaint. The facts, as disclosed by the complaint and attached exhibits, are as follows:

The corporate petitioners are common carriers by water engaged in the transportation of property in what is known as the "outbound Far East Trade."[1] They are associated as members of petitioner Far East Conference, which operates under a Conference Agreement approved in 1922 by the United States Shipping Board (a predecessor of

[1] The term includes transportation from Atlantic Coast and Gulf ports to ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands.

the Federal Maritime Board) [2] under the provisions of Section 15 of the Shipping Act, 1916, 39 Stat. 733, 734, 46 U.S.C. 814. The membership of petitioner Conference includes all but one of the common carrier shipping lines regularly engaged in the transportation of property in the outbound Far East trade. (Compl., par. 29, R. 4-5.)

The Conference Agreement (Ex. A to Compl., R. 8-16) [3] states as its purpose "to promote commerce" "for the common good of shippers and carriers, by providing just and economical co-operation between the steamship lines" involved (Preamble, R. 8). The Agreement provides, *inter alia*, for the adoption by the Conference of, and adherence by the members to, a tariff of rates and charges (pars. 1, 8, 9, R. 8, 10, 11). Liquidated damages are provided for breach of the Agreement (par. 11, R. 12). Members may be expelled for cause, and new members may be admitted to the Conference with the consent of a majority of the present members (pars. 21, 24, R. 14-15, 16).

The Conference Agreement provides that there "shall be no unjust discrimination against, and no rebates of freight or compensation shall be paid to, any shipper" by any member of the Conference (par. 2, R. 9). There is no provision in the Agreement requiring, or in terms providing, either that

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[2] The Federal Maritime Board and its predecessors are hereinafter referred to as "the Board".

[3] The Agreement has been amended from time to time, and is set forth in its amended form in the record.

there shall be exclusive dealing arrangements between Conference members and shippers, or that there shall be a dual system of rates conferring a rate advantage upon shippers who enter such arrangements. Petitioners, however, have established the so-called "contract" and "non-contract" rate system for the purpose of driving out of, and excluding from participation in the outbound Far East trade, steamship lines not parties to the combination and conspiracy, and thereby achieving and maintaining a monopoly of the transportation of cargo in such trade (Compl., par. 34, R. 6).

The combined economic power of petitioners, exerted through the above-described rate differentials, has been used to induce and compel shippers in the outbound Far East trade to enter into exclusive dealing arrangements with the shipping line petitioners (Compl., par. 33, R. 6).[4] Petitioners have enforced the exclusive dealing obligations by threatening withdrawal of the so-called "contract rates" and the imposition of oppressive fines and penalties for any deviation by shippers from the terms of the agreements (*ibid.*). The following penalty provision is embodied in the exclusive dealing contract (Ex. B, par. 4, R. 18):

> If the Shipper shall make any shipments in violation hereof, this agreement shall immedi-

[4] The exclusive dealing contract (Ex. B to Compl., R. 16-21) requires the shipper, in consideration of the rates specified, to forward all of his shipments in the outbound Far East trade by vessels of Conference members if such members have space available.

> ately become null and void as to future shipments, and thereupon the Shipper shall be liable to the transporting carriers for payment of additional freight on all commodities theretofore shipped with such carriers for a period not exceeding twelve months immediately preceding the date of such shipment, at the non-contract rate or rates on all commodities set forth in the current tariffs of the transporting carriers in force at the time of such shipments.

The exclusive patronage contracts, and the threat of oppressive fines for deviation therefrom have, as intended by petitioners, prevented other shipping lines from competing with the petitioners in the outbound Far East trade (Compl., par. 36, R. 6-7).

The proceedings below

The complaint was filed in the district court on August 6, 1948. Petitioners filed answers (R. 21, 46) admitting concerted use by them of the dual rate system and the exclusive dealing contract, but asserting, *inter alia,* that this practice was in conformity with the Conference Agreement, and that the approval of that Agreement by the Shipping Board exempted all of the acts of the petitioners alleged in the complaint from the provisions of the Sherman Act.[5] The answers also assert that the practices involved are reasonable.

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[5] Ans., pars. forty-eighth (b), R. 37; Ans., par. forty-ninth (b), R. 62. Supplemental answers were filed at a later time (R. 76, 85, 95).

Petitioners filed motions to dismiss the complaint on the ground, *inter alia*, that the court had no jurisdiction of the subject matter. It was contended that the allegations of the complaint constitute charges of violation of the Shipping Act, 1916, as amended, that the latter statute supersedes the antitrust laws in this area, and that the charges in the complaint fall initially within the exclusive jurisdiction of the Maritime Board (R. 72, 74). The Maritime Board, which had intervened as a defendant (R. 94, 98), also filed a motion to dismiss, which likewise asserted that the district court lacks jurisdiction of the subject matter of the action (R. 95). The Government filed a motion for judgment on the pleadings (R. 93).

The district court (Smith, J.), after hearing oral argument and considering briefs, denied the motions to dismiss (R. 104-5).* It rejected any suggestion that "the mere fact that the shipping industry is subject to governmental regulation" serves to exempt those engaged in it from the Sherman Act, and held that "the only exemption is that which is granted by a specific provision of the Shipping Act" (R. 99). The district court noted that Section 15, the section authorizing the Maritime Board to confer exemption by approving agreements is not unlimited, and, further, that "the

*The Government's motion for judgment on the pleadings was also denied (R. 104-5), but that ruling is not in issue here since the Government did not cross petition for a writ of certiorari to review it.

Conference Agreement, having been approved by the Shipping Board, may be within the purview of the statutory exemption, but it does not follow that *all* conduct of the defendants * * * are exempt" (*ibid.*; italics supplied).

The district court also rejected the argument that exemptions from the antitrust laws created by the Shipping Act, whatever may be their precise scope, operate as a *pro tanto* repeal of the jurisdictional provisions of the Sherman Act. While the court fully recognized that petitioners might interpose the claimed exemption as a substantive defense in the Sherman Act proceeding, it ruled that the exemption "may not be raised as a procedural bar to the right of the United States to prosecute this action" (R. 101).

SUMMARY OF ARGUMENT

I

A. No provision of the Shipping Act exempts the conduct here alleged. The express exemption provision of Section 15 is in terms applicable only to agreements which the Board finds are not unjustly discriminatory or unfair, do not operate to the detriment of the commerce of the United States, and are not in violation of the Shipping Act. There is no showing that the agreement here alleged was ever filed with or approved by the Board. The Conference Agreement, which provides generally for adoption of tariffs by joint action of the Conference members, was filed and approved, but if

that approval be construed as advance sanction of any and all subsequent conference rate agreements, it would be an unlawful abdication of the explicit duty of the Board to pass affirmatively upon all carrier agreements.

B. Whether or not the agreement to use the contract/non-contract rate system has been filed and approved, the system is unlawful because it constitutes a retaliatory, discriminating and unfair device for penalizing shippers who refuse to agree to patronize Conference members exclusively. It is therefore violative of Section 14 Third of the Shipping Act, and cannot lawfully be approved by the Board under Section 15. In this connection, the argument in the Government's brief in Nos. 134 and 135 is adopted here by reference.

II

A. The express exemption in Section 15 of the Shipping Act should not be enlarged by implication. Implied repeals are not favored, and the standards for such repeals are not met here. The Shipping Act fails to manifest any clear congressional intent to supersede the Sherman Act, except to the extent provided in Section 15. There is no inconsistency between the two statutes. *United States* v. *Borden Co.*, 308 U.S. 188.

B. Petitioners' reliance upon *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, and similar cases under the Interstate Commerce Act is misplaced. That decision precludes

the use of *private* antitrust remedies as to matters within the purview of the Shipping Act, but does not purport to restrict the right of the Attorney General to institute actions to enforce the antitrust laws. Such a right has been uniformly recognized by this Court in a long series of cases before and since the *United States Navigation* case. E.g. *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U.S. 500, 513.

C. There is no support in the legislative history of the Shipping Act for the contention that Congress meant to create a greater exemption from the antitrust laws than that which it expressly provided in Section 15.

ARGUMENT

Introduction

In our view, this case involves the single question whether a civil action by the United States under the Sherman Act is barred because the alleged conduct which forms the basis of the complaint is violative also of the Shipping Act, and because the defendants named in the complaint are persons subject to that Act.

It is somewhat misleading to consider the problem as petitioners do in terms of the primary original jurisdiction of an administrative agency to pass upon questions arising under the statute it administers. Plainly, the Federal Maritime Board does not administer the antitrust laws, nor is it empowered to adjudicate questions arising under

them. As the court below held, "The mere fact that the shipping industry is subject to governmental regulation does not wholly exempt those engaged in it from the provisions of the Sherman Act" (R. 99). The primary original jurisdiction of the Board comes into play only if it is concluded that the antitrust laws have in fact been superseded in the area involved. In other words, the real issue is whether the district court erred in this case in holding that the Sherman Act has not been expressly or impliedly repealed, *pro tanto*, by the Shipping Act.

If, as the Government contends, the conduct here involved is prohibited by the Sherman Act, and nothing in the Shipping Act either legalizes such conduct or permits the Board to legalize it, then there is no connection between any possible Board action and the question whether the antitrust laws have been violated.

The reliance by all parties here on the early case of *United States* v. *Pacific & Arctic Co.*, 228 U.S. 87, illustrates the confusion which arises from failure to differentiate between the two concepts—repeal and primary jurisdiction. Petitioners point to *Pacific & Arctic* for its holding that offenses under the Interstate Commerce Act must first be considered by the Interstate Commerce Commission. The Government relies on the same case for its holding that offenses under the Sherman Act are triable by the district court in the ordinary manner even though they arise in the transportation field.

Petitioners seek to distinguish this latter holding (Other Pet. Br.[7] 32-34) on the ground that the Sherman Act was applicable only because the Interstate Commerce Act did not cover the conduct involved. Although we do not think that the opinion of this Court in *Pacific & Arctic* supports that theory, our point here is simply that in any event it would not be enough to show that some other statute covers the conduct in question; it must also be shown that the Sherman Act has been *pro tanto* repealed. If it has not, then there is no occasion to apply the primary jurisdiction rule.

We propose to show that the express exemption from the antitrust laws contained in the Shipping Act is limited in character and does not cover the conduct alleged in this complaint. And we propose to show further that there is no basis in principle, precedent, or the legislative history of the Shipping Act for the conclusion that, as applied to suits by the United States, this limited express exemption should be enlarged by implication to cover all matters cognizable under the Shipping Act.

I

Petitioners' conduct has not been exempted from the Sherman Act by any provision of the Shipping Act

Section 15 of the Shipping Act (*infra*, pp. 45-46) generally requires the filing with the Board of carrier agreements affecting rates, shipping practices

[7] Abbreviation for "Brief of Petitioners other than Isthmian Steamship Company."

and competition. All such agreements (unless in existence when the Act was passed) are expressly made "lawful only when and as long as approved by the board". And the Board's power to approve agreements is by no means unlimited. Only those agreements which (1) are not "unjustly discriminatory or unfair as between carriers, shippers [etc.]", (2) do not "operate to the detriment of the commerce of the United States," and (3) are not "in violation of this Act," may be approved. Thus an agreement does not acquire validity under Section 15 merely because it is of the type which is required to be filed thereunder, or because in fact it has been filed. It becomes lawful only when approved by the Board, acting within the powers in terms conferred by the Section. To illustrate, an agreement providing for deferred rebates is an agreement "giving * * * special rates" and "preventing, or destroying competition." Hence, it would have to be filed under Section 15 (*infra*, p. 45). But the requirement that the agreement be filed, or the actual filing of such an agreement, would not make it lawful. Only lawful Board approval could validate the agreement, and the Board could not lawfully approve the use of deferred rebates. Section 14 First.

The exemption provision of Section 15 is explicit:

> Every agreement, modification, or cancellation *lawful* under this section shall be excepted from * * * [the antitrust laws]. [Italics added.]

As a matter of statutory construction, it seems beyond debate that the qualification introduced by the word "lawful" precludes treating the exemption as unlimited. The provision can hardly be read as if it said "Every agreement * * * within the purview of this section shall be exempted", or "Every agreement * * * lawful *or unlawful* under this section shall be exempted". Yet petitioners are forced to urge such a perversion of explicit language if they are to rely upon this provision to exculpate their conduct from the Sherman Act. On the facts alleged in the complaint, and admitted by the motions to dismiss, petitioners' conduct is clearly not lawful under Section 15. First, the rate agreements embodying the contract/non-contract rate system are not shown to have been filed with or approved by the Board. Second, the Board is without power in any event to approve the system because it involves retaliation against shippers and use of discriminating and unfair methods in direct violation of Section 14 Third of the Shipping Act.

A. The conference agreements, if any, permitting the use of the contract/non-contract rate system, have not been filed with and approved by the Board.

The complaint charges (par. 32, R. 5-6) that petitioners have engaged in "a continuing agreement" to

> control the transportation of all cargo in the outbound Far East trade by establishing and

> maintaining a system of "contract rates" and higher "non-contract rates," the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade.

The complaint does not show that this agreement was filed with or approved by the Board.[8] The only agreement referred to in the complaint as having been so filed and approved is Conference Agreement No. 17 (par. 29, R. 5), a copy of which (as amended to December 4, 1947) is attached to the complaint (Ex. A, R. 8). That agreement may be searched in vain for any direct reference to the contract/non-contract rate system. Petitioners rely, however, upon paragraphs 1, 8, and 9 of this agreement as sanctioning the dual rate system,

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[8] Petitioners place some reliance (Isthmian Br. 29-30, Other Pet. Br. 42-44) upon the discussion of the Board in *Investigation—Section 19 of Merchant Marine Act, 1920*, 1 U.S.S.B.B. 470, 480 (1935) as establishing the recognition and approval of the use by petitioner Far East Conference of contract/non-contract rates, but neither formal nor informal approval is conveyed by the quoted language. The principal concern of the investigation appears to have been undue rate cutting (*id.* at 501); the order which emerged required that tariffs in the future be filed with the Board (*id.* at 502-3). It does not appear that the limited use of the contract/non-contract rate system described was challenged or was in any way at issue. And even if it be assumed, *arguendo*, that this casual reference to use of the dual rate system constitutes the kind of approval contemplated by Section 15, there is no showing that the agreements alleged by the complaint are the same as those discussed in the above Board decision.

since that system involves the fixing of rates (Isthmian Br. 29; Other Pet. Br. 39-41). These paragraphs are as follows (R. 8, 10-11):

> 1. All freight or other charges for the transportation of cargo between the aforementioned ports shall be charged and collected by the parties hereto strictly in accordance with the tariff of rates and charges agreed to by the parties.
>
> * * * * *
>
> 8. The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges, or the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at not later than 4 P. M. of the day prior to the date of meeting; and the Chairman shall cause such notice to be given on the request of any party hereto made in writing to the Chairman not later than 11:00 A.M. of the day prior to the date of meeting. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any matter or thing brought before the meeting in the manner aforesaid and agreed to by a majority of the parties hereto, shall thereby become an agreement binding upon all

of the parties hereto, with the same force and effect as if expressly made a part of this agreement.

9. Pursuant to recommendations made by the Chairman, or pursuant to the recommendation of any Committee or Sub-Committee authorized by a majority vote of the parties hereto, and appointed as provided in Article 7 hereof, or without any recommendation, the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof.

The above language confers authority in the broadest of terms upon the Conference to adopt rate agreements. There are no limitations as to the lawfulness, character, or reasonableness of any of the prospective agreements.[9] Petitioners contend, however, that approval of a basic conference agreement carries with it advance endorsement of any and every rate agreement which the conference may thereafter adopt (Isthmian Br. 29-31; Other Pet. Br. 40-43). That would indeed be dele-

[9] Another provision (par. 2, R. 9) prohibits individual members (not the Conference) from any "unjust discrimination against" any shipper.

gation run riot of public authority to private parties. It would mean that the Board had authorized a combination which "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of" foreign commerce. *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465.

The language of Section 15 of the Shipping Act, making carrier agreements unlawful unless and until explicitly approved by the Board, hardly lends itself to the notion that all future conference agreements can be endorsed in advance in blank with the Board's imprimatur. Petitioners have not succeeded in showing how the Board could find in advance that any agreement which might thereafter be reached by a particular group of shipping lines [10] would not be unjustly discriminatory, or detrimental to the commerce of the United States, or in violation of the Shipping Act. Yet, these specific findings are a prerequisite to Board approval

[10] The extreme charact - of the purported delegation is aggravated by the fact that the composition of this private group is by no means a stable or permanent one. The membership of the Conference is subject to change on short notice and without Board approval (Ex. A to Compl., par. 22, R. 15; par. 24, R. 16). The Conference is empowered to act by majority vote (Ex. A, Compl., par. 9, R. 11). The majority of the Conference to which these powers are assertedly delegated may at any particular time be composed of foreign corporations. That this is the present situation is indicated by the list of shipping lines named defendants in this complaint. Of the 25 lines named, only 6 are American corporations (R. 2-4). It is unlikely that Congress intended to make it possible to delegate to a group controlled by foreign corporations the function of deciding whether particular agreements are detrimental to the commerce of the United States.

of any agreement under Section 15. Petitioners would substitute, in place of such findings, a general anticipatory hope and guess on the part of the Board that none of these particular evils will come to pass.

The legislative history of the Shipping Act, which is heavily relied upon by petitioners to establish the importance of leaving to the Board the administration of matters affecting the shipping industry (Isthmian Br. 34-42; Other Pet. Br. 72-87), is also irreconcilable with the concept of abdication of that function here urged. The Alexander Report (H. Doc. 805, 63rd Cong., 2nd Sess., 417-8) states:

> While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of *effective government supervision.* To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service. [Italics added.]

Petitioners may argue that the delegation by the Board implicit in the construction they urge is not irrevocable, because any agreement reached by a

conference may be disapproved by the Board at any time, even though once approved. This is perfectly true, but it is equally true that such a procedure is not the one which Congress saw fit to require. To treat every agreement as legal until disapproved would do violence to the express statutory provision to the contrary. It is untenable to contend that a public regulatory body could discharge an explicit duty to pass affirmatively upon every oral or written rate agreement including "understandings, conferences, and other arrangements", by approving a basic conference agreement delegating limitless power to a majority of shipping lines within the conference, subject only to the agency's reserved right of disapproval. Nor can it be successfully maintained that Board approval of the dual rate system is so well settled that to present each individual agreement to it for approval would be a futile act. Not only has the Board approved the use of the system in some circumstances and disapproved it in others,[11] but in the decision in *Isbrandtsen Company, Inc.* v. *North Atlantic Continental Freight Conference*, 3 F.M.B. 235 (1950), now before this Court for review (Nos.

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[11] Compare *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922); *Intercoastal Investigation*, 1 U.S.S.B.B. 400 (1935); *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939); and *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524, approved, *Swayne & Hoyt, Ltd.* v. *United States*, 18 F. Supp. 25 (D. D.C.), affirmed, 300 U.S. 297, with *Rawleigh* v. *Stoomvaart*, 1 U.S.S.B. 285 (1933); and *Pacific Coast European Conference*, 3 U.S.M.C. 11.

134, 135; see *infra*, p. 22), the Board said (3 F.M.B. at 241):

> The practice of our predecessors has been to examine the details of each dual rate system which has been presented, and determine whether there was violation of any express prohibition of the Act, or whether any features were unreasonable or unjustly discriminatory. In a number of the reported decisions of our predecessors, dual rate systems have been disapproved on the latter ground.

Although we differ with the Board's conclusion as to its power to approve the dual rate system at all (see *infra*, p. 22), we think it clear that if that power be assumed, the Board's *ad hoc* treatment of each case upon its own facts completely refutes any suggestion that Board approval is so automatic as to be regarded as a formality.

The practical consequences of petitioners' interpretation are equally serious. Section 15 draws no distinction between the kinds of agreements which must be filed, and the kinds which must have Board approval to be legal. Hence, if the Board's approval of a basic conference agreement carries with it Board approval of every subsequent agreement reached by the Conference, then it would follow that none of these subsequent agreements need be filed with the Board. Thus the entire system of secret conference agreements and oppressive conference practices which led to the enactment of the

Shipping Act[12] would be permitted to flourish with the tacit blessing of the administrative agency which Congress created to regulate the industry.

The point is so clear that it need not be labored further. We submit that the filing of a general conference agreement which provides for further specific agreements is not a substitute for the filing of such further agreements, and the approval by the Board of a basic conference agreement does not constitute approval of all subsequent agreements made thereunder.

B. The Board is not empowered to approve the contract/non-contract rate system.

In *Rederi, et al.* v. *Isbrandtsen Co., Inc., et al.*, No. 134, and *Federal Maritime Board* v. *United States, et al.*, No. 135, the power of the Board under Section 15 to approve the contract/non-contract rate system is the central issue presented for decision. The order of the Board under review in that case explicitly approves the use of the system in the circumstances there presented. For the reasons stated in the Government's brief in those cases, we believe that the following is clear: (1) Higher "non-contract" rates levied against shippers who refuse to enter exclusive dealing contracts with a conference constitute retaliation against shippers and resort to discriminating and unfair methods. (2) Such methods are directly

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[12] H. Doc. 805, 63rd Cong., 2nd Sess., 304, 307, 311-3, 417-8.

violative of Section 14 Third of the Shipping Act which makes it unlawful for any common carrier by water to

> Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason;

(3) Since the Board is forbidden by the express language of Section 15 to approve agreements "in violation of this Act", it obviously cannot approve agreements in violation of Section 14 Third of the Act.

The argument in the Government's brief in Nos. 134 and 135 is hereby adopted and made a part of this brief.

II

Petitioners' conduct is not exempted from the Sherman Act by implication

In point I it was demonstrated that the narrowly drawn exemption from the Sherman Act contained in Section 15 of the Shipping Act does not exculpate the alleged actions of petitioners which stand admitted here. We think it equally clear that there has been no *pro tanto* repeal of the antitrust laws by implication.

A. This Court has repeatedly rejected contentions that Government antitrust remedies have been superseded by implication.

Petitioners cite many cases in support of the settled doctrine that an administrative agency has exclusive primary jurisdiction to pass upon most of the questions arising under the statute *which it administers*. The question here, however, is not whether the Board has exclusive original jurisdiction of a proceeding under the Shipping Act, but whether a cause of action under the antitrust laws is barred by the Shipping Act. In other words, the problem here is whether the antitrust laws have been repealed by implication with respect to all conduct which may come within the purview of the Shipping Act.

None of the decisions in this Court cited by petitioners stands for the proposition that an action by the United States under the Sherman Act is barred by the existence of some other regulatory statute dealing with the area of activity involved. An unbroken line of decisions is to the contrary.[13]

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[13] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *United States* v. *Joint Traffic Association*, 171 U.S. 505; *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383; *United States* v. *Pacific & Arctic Co.*, 228 U.S. 87; *United States* v. *Borden Co.*, 308 U.S. 188; *United States Alkali Assn., Inc.* v. *United States*, 325 U.S. 196; and see, *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156, 161-2; *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U.S. 469, 474-5; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U.S. 500, 513; *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 452-3, 456-7, and see dissenting opinion, p. 474; and *United States Navigation Co.* v. *Cunard Steamship Co.*, 50 F. 2d 83, 85-6, 88, 89 (C.A. 2), affirmed, 284 U.S. 474.

In a variety of situations this Court has rejected contentions that the antitrust laws have been repealed or superseded by implication.

The early case of *United States* v. *Pacific & Arctic Co.*, 228 U.S. 87, is an apt illustration that the doctrine of prior administrative determination, applicable to judicial proceedings based upon obligations imposed by a regulatory statute such as the Interstate Commerce Act, does not apply to a suit by the Government to enforce the Sherman Act. In that case the district court had dismissed an indictment containing two counts charging violation of the Sherman Act and three Counts charging violation of the Interstate Commerce Act, upon the theory that the acts charged against the defendants concerned discrimination in rates and through billing which the Interstate Commerce Act committed to the Interstate Commerce Commission for initial determination. This Court upheld the decision as to the Interstate Commerce Act counts but reversed as to the Sherman Act counts. The Court held that since the latter counts set forth a combination prohibited by the Sherman Act, the power of the Interstate Commerce Commission over the rates and through-traffic arrangements adopted by the defendants was irrelevant (228 U.S. at 104-5).

In *United States* v. *Borden Co.*, 308 U.S. 188, the district court had dismissed certain counts of an indictment under the Sherman Act upon the

ground that the Agricultural Marketing Agreement Act, 50 Stat. 246, 7 U.S.C. 671 *et seq.*, had vested in the Secretary of Agriculture plenary power over the marketing of milk, and that as a result such marketing "'is removed from the purview of the Sherman Act'" (308 U.S. at 197). This Court reversed unanimously. The Court pointed out that there was no express provision creating such an unqualified exemption in the Agricultural Marketing Agreement Act, and reaffirmed the "cardinal principle of construction that repeals by implication are not favored" (p. 198). The following language (per Chief Justice Hughes) is particularly pertinent here (pp. 198-9):

> When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States* v. *Tynen*, 11 Wall. 88, 92; *Henderson's Tobacco*, 11 Wall. 652, 657; *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest." *Red Rock* v. *Henry*, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States*, 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by

implication only *pro tanto* to the extent of the repugnancy." See, also, *Posados* v. *National City Bank*, 296 U.S. 497, 504.

In the *Borden* case, as here, the statute relied upon as superseding the Sherman Act in a particular area of economic activity contained express provisions prescribing the scope of antitrust exemption. Of these provisions this Court said (p. 201):

> These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

Petitioners point out that the *Borden* case may be distinguished on its facts from the case at bar, and that the statute involved in that case is less comprehensive in its regulatory scheme than the Shipping Act (Isthmian Br. 24-5; Other Pet. Br. 101-4). But the standards there established for judging repeals by implication are applicable generally. If they are given effect here, it is clear that there can be no repeal by implication. In the language of Mr. Justice Story (quoted approvingly in the *Borden* case, *supra*), it would not be sufficient for petitioners "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirma-

tive, or cumulative, or auxiliary." In the present case the subsequent law does not purport to cover all the matters covered by the Sherman Act. Thus, for example, there is nothing in the Shipping Act comparable to the monopoly provisions of Section 2 of the Sherman Act. A single carrier which set out to achieve a monopoly by buying up competitors would violate no provision of the former Act.

The *Borden* case holds that before repeal of a statute by a later one will be inferred, there must be a "clear and manifest intention" by Congress to repeal, and a "positive repugnancy" between the old and new statutes. There is no clear and manifest intention by Congress to confer an unlimited exemption here; indeed, the inclusion of the limited exemption provision indicates a contrary intention. (And see discussion of legislative history, Section C, *infra*.)

Finally, there is no "positive repugnancy" between the two statutes. The court below has pointed out that Section 15, the only provision of the Shipping Act which affirmatively authorizes the Board to permit activity violative of the antitrust laws, contains an express exemption "coterminous with this limited authority" (R. 100). Thus if we should be in error in our contention that Section 14 Third precludes Board approval of the contract/non-contract rate system (point I B, *supra*), and if it should be established at the trial of this case that the agreements to utilize the contract/non-contract rate system had been filed with and lawfully ap-

proved by the Board, petitioners would have a complete defense to this action. This fact is clearly recognized by the decision of the court below (R. 100-1). Conversely, if our contentions are correct, an injunction under the antitrust laws against the conduct here involved would in no way interfere with the administration of the Shipping Act.[14]

In *United States Alkali Assn., Inc.* v. *United States*, 325 U.S. 196, this Court considered a statutory scheme which came closer to justifying the conclusion that there was congressional intention to repeal the Sherman Act *pro tanto* than does the present case. The Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61 *et seq.*, explicitly exempts certain activities of export associations from the Sherman Act. Section 5 of the Webb-Pomerene Act confers upon the Federal Trade Commission the duty to investigate activities of such an association which go beyond the scope of the exemption. The Commission has the power to make recommendations to the association for readjustment of its activities and, if the recommendations are not accepted, the duty to refer the matter to the Attorney General. On its face this provision is susceptible of the interpretation that exhaustion of the administrative procedure was intended to be a prerequisite to judicial enforcement of the Sher-

[14] There is no difficulty in drawing an injunction that will leave the Board free to exercise its powers. See *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U.S. 383, 412 (discussed at length by petitioners (Other Pet. Br. 35-6)).

man Act against an export association. And a legitimate primary jurisdiction argument could be made because the Commission was actually given duties in connection with the enforcement of the Sherman Act.

Petitioners in the *Alkali* case strongly urged that the congressional scheme envisioned both a preliminary administrative determination as to the lawfulness of the activities involved, and a chance for accused associations to remedy their practices before facing judicial action. This Court held, however, with but a single dissent, that the powers vested in the Commission did not impliedly curtail the Attorney General's statutory authority to institute proceedings to prevent violation of the Act. The Court said (325 U.S. 206):

> A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may appropriately be brought, would require a clear expression of that purpose by Congress.

Petitioners attempt to distinguish the *Borden* and *Alkali* cases upon the ground that the regulatory statutes which the defendants there relied upon gave to the respective administrative agencies no power of prohibition as to the conduct charged to be in violation of the Sherman Act, whereas the Shipping Act renders unlawful agreements which do not meet its standards (Other Pet.

Br. 101-8).[15] But this distinction is without significance since offenses condemned by the Shipping Act are totally distinct from the offenses condemned by the Sherman Act. As to the latter Act, the Shipping Act gives the Board no power of enforcement, just as in the *Pacific & Arctic, Borden* and *Alkali* cases the respective regulatory statutes gave no such power to the administrative agencies there involved. And particular activity may and frequently does fall within the condemnation of two or more statutes.

B. Cases barring private antitrust remedies are inapplicable in an action by the United States.

Petitioners rely primarily upon *United States Navigation Co., Inc. v. Cunard Steamship Co.*, 284 U.S. 474. The Court there held that the Shipping Act supersedes the antitrust laws with respect to *private* actions brought under Section 16 of the Clayton Act complaining of wrongs for which the Shipping Act provides a redress. But this Court made it clear that it was not passing on the right of the *Government* to prosecute actions under the antitrust laws relating to matters within the general purview of the Shipping Act (284 U.S. at 486).

[15] The decision in the *Borden* case, insofar as it relates to the Capper-Volsted Act, is not within the asserted distinction. The Capper-Volsted Act gives the Secretary of Agriculture power to prevent undue restraint of trade or monopolization by agricultural cooperatives, but this Court held that the authority thus conferred (in an area common with that of the Sherman Act) was auxiliary to, rather than an implied substitute for, the provisions of the Sherman Act (308 U.S. at p. 206).

The opinion of the Court of Appeals for the Second Circuit in that case (50 F. 2d 83, 89), flatly recognized that the Government would have a right to bring a suit of the character there involved. This opinion (by Judge Augustus Hand) was cited with approval in this Court's decision as an "able and carefully drawn opinion" (284 U.S. at 481).

The primary basis of the decision in the *United States Navigation* case, with reference to private suitors, was the settled line of precedents under the analogous Interstate Commerce Act. This Court stated (p. 481):

> In its general scope and purpose, as well as in its terms, that [Shipping] act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect.

The Court then reviewed the *private* remedy cases in the Interstate Commerce Act field, such as *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156, and concluded that private antitrust remedies were also barred by the Shipping Act in the circumstances there presented.

If the *United States Navigation* case and the Interstate Commerce Act precedents upon which it was based are fully accepted, it does not follow that Government antitrust actions are barred. This Court has upheld actions by the United States un-

der the antitrust laws in the area subject to Inte state Commerce Commission regulation at least fi times (*supra*, p. 24, n. 13) and it has at least thr times strongly reaffirmed that rule in the very cas in which antitrust remedies were being denied private suitors. In *Keogh* v. *Chicago & Nort western Railway Co.*, 260 U.S. 156, 161-2, th Court, in a unanimous opinion by Mr. Justi Brandeis, said the following:

> All the rates fixed were reasonable and no discriminatory. That was settled by the pr ceedings before the Commission. *Los Angel Switching Case*, 234 U.S. 294. But under t Anti-Trust Act, a combination of carriers t fix reasonable and non-discriminatory rat may be illegal; and if so, the Government ma have redress by criminal proceedings unde § 3, by injunction under § 4, and by forfeitu under § 6. That was settled by *United Stat* v. *Trans-Missouri Freight Association*, 16 U.S. 290, and *United States* v. *Joint Traff Association*, 171 U.S. 505.

In *Central Transfer Co.* v. *Terminal Railroa Assn.*, 288 U.S. 469, 474-5, Mr. Justice Stone, for unanimous Court, in discussing a contention of private petitioner that a particular matter wa outside of the jurisdiction of the Interstate Com merce Commission, said:

> This argument misconceives both the effe and the purpose of § 16 of the Clayton Ac Under that section jurisdiction of the Commi sion does not delimit the jurisdiction of th

federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505. *It affects only the capacity of a private party to maintain a suit to restrain violations.* See *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, *except when the suit is brought by the Government itself.* [Italics added.]

In *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U.S. 500, another decision subsequent to that in *United States Navigation, supra,* this Court again held a private action under the Sherman and Clayton Acts barred where the subject matter came within the purview of the Interstate Commerce Commission. Mr. Justice Cardozo, speaking for the Court, relied upon the *United States Navigation* case as a ground of decision. After reciting the holding in *United States Navigation,* the opinion [16] states (297 U.S. at 513):

The decision was that the plaintiff must seek redress by application to the Shipping Board. True, the Anti-Trust Laws, since the enactment of the Clayton Act, have been explicit in providing that any one injured by an unlawful

[16] There was no dissent.

combination might have relief by injunction against threatened damage to his business. 15 U.S.C., § 26; *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U.S. 37. To this there is an exception where the subject matter of the complaint is a wrong within the jurisdiction of the Interstate Commerce Commission, *in which case an injunction, if granted, must be at the instance of the government.* [Italics added.]

In *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, this Court upheld the right of Georgia to bring an action seeking injunctive relief under the Sherman Act against a number of railroads. Although the Court divided sharply on a number of issues in that case, there was no disagreement as to the basic premise that a suit by the United States based upon the same alleged offenses would lie. Chief Justice Stone, dissenting, stated (324 U.S. at 474):

> Thus the Sherman Act entrusted to the national government the duty to represent the people in the vindication of their rights under the antitrust laws. And this is confirmed by § 16 of the Clayton Act, which permits injunction suits by the United States against common carriers in respect of matters within the province of the Interstate Commerce Commission, while prohibiting such suits to all others, including a State.

In the light of the above authorities it is too late to assert that there is no basis for a distinction between Government actions and private actions under the antitrust laws in areas within the jurisdiction of the Interstate Commerce Commission. And the *United States Navigation* case explicitly lays down the rule that the Shipping Act is to be construed in the light of the settled construction of the Interstate Commerce Act. See *supra*, p. 32.[17] But even if this overwhelming authority were to be disregarded, and the matter were to be considered anew on its merits, we submit that the distinction between government and private actions is not the product of judicial vagary. It finds support both in statutory provisions and in reason.

Section 16 of the Clayton Act reflects a clear congressional intention to preserve the jurisdiction of the Interstate Commerce Commission against judicial interference through private actions for in-

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[17] Nor is it tenable to argue that if the Reed-Bulwinkle Amendment to the Interstate Commerce Act (62 Stat. 472, 49 U.S.C., Supp. IV, 5b) had been on the books at the time the above decisions were rendered, a different result would have been reached as to the right of the Attorney General to institute antitrust suits in the Interstate Commerce Act field. The exemption from the antitrust laws in the Reed-Bulwinkle Amendment, like the exemption in Section 15 of the Shipping Act, is narrowly drawn and precisely limited. Section 5a (9) (the exemption provision provides as follows (49 U.S.C., Supp. IV, 5b (9)):

"Parties to any agreement approved by the Commission under this section and others persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

junctive relief. At the same time the Section preserves Government remedies inviolate. Prior to the adoption of this Section, the Government alone was authorized to maintain a suit to restrain violations of the antitrust laws. *Paine Lumber Co.* v. *Neal*, 244 U.S. 459. Section 16 (*infra*, p. 47) authorized private parties to maintain such suits, but provided that no person, "except the United States," may bring suit for injunctive relief against any common carrier subject to the Inter-State Commerce Act "in respect to any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." This limitation had as its "obvious purpose" precluding any interference with activities of interstate carriers subject to the Commission's jurisdiction "except when the suit is brought by the Government itself." *Central Transfer Co.* v. *Terminal R. R. Assn.*, 288 U.S. 469, 475.

The judicially developed rule barring private treble damage actions was in considerable measure a reflection of the Court's apprehension that if one injured shipper were allowed to recover treble damages, it might give him a preference over others. See *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U.S. 156, 163.[18] This consideration is plainly irrelevant

[18] In the *Keogh* case the Court said that recovery by a shipper in a triple damage suit under the antitrust laws would be the equivalent of a rebate, stringently prohibited by the Interstate Commerce Act. "Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." 260 U.S. at 163.

in Government antitrust actions since the treble damage remedy is not available to the United States. *United States* v. *Cooper Corp.*, 312 U.S. 600.

Finally, the reasoning with respect to adequacy of remedy which has been applied to private suitors is not applicable to the United States. The Government does not bring an action under the antitrust laws to remedy a private specific injury, but to vindicate public rights. It is questionable whether the United States can appear as of right as a complainant before the Board.[19] *United States* v. *Cooper Corp., supra; United States* v. *United Mine Workers*, 330 U.S. 258, 275. But whether it could or not, the remedy would be inadequate because the Board is powerless to enforce the antitrust laws. The very denial of antitrust remedies to private plaintiffs must rest at least in part on the premise that the public interest in enforcement of those laws will continue to be vindicated by the Government. Compare Section 16 of the Clayton Act, *supra*.

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[19] Under the provisions and language of Section 22 of the Shipping Act, it is doubtful whether the United States, acting in its sovereign capacity, is a "person" entitled to file a complaint with the Maritime Board attacking the discriminatory character of rates adopted by steamship lines. *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, which upheld the right of the United States to maintain an action for the recovery of injury suffered by it as a *shipper* of goods, involved altogether different considerations and statutory provisions. Nor does the United States have an adequate remedy under Section 22 merely because it may be entitled to intervene if proceedings thereunder have been instituted by a private party or by the Maritime Board.

C. There is no support in the legislative history for expanding the specific antitrust exemption which Congress provided.

The legislative history set forth by petitioners (Isthmian Br. 34-42, Other Pet. Br. 72-87) makes clear that there is no evidence of a purpose upon the part of Congress or the Alexander Committee to supersede the Sherman Act, except to the limited extent which the statute provides. The only evidence cited by petitioners which gives any comfort to their contention is the statement of Senator Cummins, in support of an amendment to delete the antitrust exemption provision which now appears in Section 15, that "This is the part of the bill which repeals the antitrust law" (53 Cong. Rec. 12815). We submit that the occasional hyperbole indulged in by opponents of a particular provision of a bill during the course of debate is not strong evidence of the meaning of the bill. As this Court observed in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394, "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." Moreover, the substantial opposition to *any* exemption provision reflected in the vote as to striking the limited provision [20] strongly indicates that a broader exemption provision might well have been defeated.

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[20] Petitioner Isthmian states the votes to have been as follows (Br. 41): House: 209 nays to 161 yeas; Senate 37 nays, 23 yeas.

The Alexander Committee failed to include in its report any specific recommendation with reference to exemption from the antitrust laws; accordingly, the express (and limited) exemption embodied in the Act must be taken as the best indication of what the Committee intended. To be sure, Representative Alexander stated that the Committee had chosen to recommend reasonable regulation of combinations of carriers, rather than enforcement (and, if necessary, strengthening) of the antitrust laws for the purpose of breaking up such combinations (53 Cong. Rec. 8077). But this general statement does not purport to define the scope of exemption. It is simply a statement of the Committee's basic conclusion that the conference is an institution with more virtues than vices, so that regulation rather than elimination is appropriate. And the limited exemption from the antitrust laws embodied in Section 15 fully implements that purpose. The carrier agreements which the Board lawfully approves as not unjustly discriminatory, detrimental to the commerce of the United States, or in violation of the Shipping Act are exempt from the antitrust laws. Those agreements not approved by the Board, or which are beyond the pale of possible approval under Section 15, are made unlawful under the Shipping Act and are left subject to the full force of the antitrust laws.

In a speech by Representative Burke (a member of the Alexander Committee) quoted by petitioners (Other Pet. Br. 81-2), the view is expressed that "there was no law to be found upon the statute books" (53 Cong. Rec. 8095) to deal with the "unfair practices resorted to by water carriers for the purpose of destroying competition, and of discriminating and retaliating against persons and places who would not tamely submit to their dictation" (*ibid.*). This speech reflects an erroneous view that the antitrust laws are impotent;[21] it hardly reflects a mood conducive to aggravating the assumed impotence.

Petitioners point out that the Alexander Committee performed the major portion of its labors in the Congress that adopted the Clayton Act (Other Pet. Br. 74). It seems unlikely that in such an environment the Committee would have wished to preside over the liquidation of the antitrust laws—even *pro tanto*. To be sure, the Committee desired to supersede the antitrust laws as to "lawful" agreements sanctioned under the Act, but to impute solicitude on the part of the Committee toward those who make agreements violative of the Shipping Act is wholly unwarranted. If

[21] The basis of this misconception may have been the somewhat slow progress then being made by antitrust litigation in this field. This Court did not finally hold the deferred rebate system violative of the Sherman Act until 1917. *Thomsen* v. *Cayser*, 243 U.S. 66. (See Other Pet. Br. 74-5 for history of this case.)

petitioners are to sustain the heavy burden of showing that Congress meant to exempt from the Sherman Act not only those who operate lawfully within the framework of the Shipping Act, but law breakers as well, petitioners should be able to point to some clear evidence in the legislative history to that effect. This they have not been able to do.

We do not suggest that the antitrust laws may be used as a device to interfere with the scheme of regulated competition created by the Shipping Act. But the express exemption provision of that Act is fully adequate to prevent such interference. What the Board has lawfully sanctioned, the Sherman Act leaves alone. What the Board has not lawfully sanctioned, or cannot lawfully sanction, has no claim to exemption from the Sherman Act.

It is submitted that there has been an inadequate showing to establish that Congress, when it exempted from the Sherman Act certain agreements lawfully approved under the Shipping Act, meant to include all agreements—lawful or unlawful—entered into by persons subject to the jurisdiction of the Board under the latter Act. It has not been established that "Congress intended to create 'so great a breach in historic remedies and sanctions' ", *United States* v. *Borden Co.*, 308 U.S. 188, 198.

CONCLUSION

For the foregoing reasons, the order denying petitioners' motions to dismiss the complaint should be affirmed.

Respectfully submitted,

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JANUARY 1952.

APPENDIX

Section 4 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *. [15 U. S. C. 4.]

The Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 46 U.S.C. 801 *et seq.*, provides in part as follows:

> Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> * * * * *
>
> Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason. [46 U. S. C. 812.]

Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Federal Maritime Board] * * * a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this

Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U. S. C. 814.]

Section 16 of the Act of October 15, 1914, 38 Stat. 730, 737, 15 U.S.C. 26, provides as follows:

> Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 [illegible]